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Kanawagi a/l Seperumaniam v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-09–147–04 OF 2016
ZAWAWI SALLEH, AHMADI ASNAWI AND HASNAH HASHIM JJCA
31 OCTOBER 2017

C

Criminal Procedure — Charge — Application to set aside — Criminal notice of application — Perjury — Whether charge can be brought against appellant arising from testimony during cross-examination by prosecution at defence stage

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The appellant was initially charged with three charges under s 471 read together with s 467 of the Penal Code ('the Code') in the Kuala Lumpur Sessions Court ('the first trial'). Before the decision for the first trial was made, the appellant was charged for committing perjury in the first trial ('the second trial'). This appeal originated when the appellant subsequently filed an application on 14 April 2015 in the sessions court to set aside and quash and subsequently discharge and acquit him in regard to the second trial. The application was dismissed in the sessions court as the court was unable to determine whether the evidence adduced in the second suit was similar to the evidence adduced in the first suit. The appellant later appealed to the High Court where the High Court judge agreed with the sessions court judge that at that stage, it was premature to determine whether the evidence to be adduced would be similar as the first suit. The appellant then appealed against this decision. The issue for determination by the court was whether a charge could be brought against the appellant arising from testimony during cross-examination by the prosecution at the defence stage in the first trial.

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Held, dismissing the appeal and affirming decision of the High Court:

(1) The decision of the High Court judge was correct that it would be premature to conclude whether the prosecution would be able to prove its case under s 193 of the Code against the appellant. In the circumstances of this case, the most convenient procedure should be followed, namely that the prosecution should be allowed to present or offer evidence that would substantiate the charge against the appellant (see para 25).

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(2) The prosecution was entitled to the due process in criminal cases, that was, a fair opportunity to prosecute. The appellant could not claim denial of due process because he would have the opportunity to contest the evidence adduced against him and to prove his defence after the prosecution concluded the case (see paras 26–27).

I

[Bahasa Malaysia summary

Perayu pada mulanya dituduh dengan tiga tuduhan di bawah s 471 dibaca bersama dengan s 467 Kanun Keseksaan ('Kanun') di Mahkamah Sesyen Kuala Lumpur ('perbicaraan pertama'). Sebelum keputusan untuk perbicaraan pertama dibuat, perayu dituduh melakukan sumpah bohong di dalam perbicaraan pertama ('perbicaraan kedua'). Rayuan ini bermula apabila perayu kemudiannya memfailkan permohonan pada 14 April 2015 di mahkamah sesyen untuk mengenepikan dan membatalkan dan kemudiannya melepaskan dan membebaskannya berkaitan perbicaraan kedua. Permohonan ditolak di mahkamah sesyen kerana mahkamah tidak dapat menentukan sama ada keterangan yang dikemukakan di dalam tindakan kedua adalah sama dengan keterangan yang dikemukakan di dalam tindakan pertama. Perayu kemudiannya merayu kepada Mahkamah Tinggi di mana hakim Mahkamah Tinggi bersetuju dengan hakim mahkamah sesyen bahawa di peringkat tersebut, adalah pramatang untuk menentukan sama ada keterangan untuk dikemukakan akan sama seperti tindakan pertama. Perayu kemudiannya merayu terhadap keputusan ini. Isu untuk penentuan oleh mahkamah adalah sama ada tuduhan boleh dibawa terhadap perayu berbangkit daripada keterangan semasa pemeriksaan balas oleh pihak pendakwaan di peringkat pembelaan di perbicaraan pertama.

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Keputusan hakim Mahkamah Tinggi adalah betul bahawa ia akan jadi pramatang untuk menyimpulkan sama ada pihak pendakwaan akan dapat membuktikan kesnya di bawah s 193 Kanun terhadap perayu. Dalam keadaan kes ini, prosedur yang paling mudah untuk diikuti, iaitu bahawa pihak pendakwaan patut dibenarkan untuk kemukakan atau menawarkan keterangan yang akan membuktikan tuduhan terhadap perayu (lihat perenggan 25).

(2) Pihak pendakwaan mempunyai hak kepada proses yang wajar dalam kes jenayah, iaitu, peluang adil untuk mendakwa. Perayu tidak dapat menuntut penafian proses wajar kerana dia akan mempunyai peluang untuk mempertikaikan keterangan yang dikemukakan terhadapnya dan untuk membuktikan pembelaannya selepas pihak pendakwaan menyimpulkan kes (lihat perenggan 26–27).]

Notes

For cases on charge in general, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1370–1880.

Legislation referred to

Criminal Procedure Code ss 113, 113(2), 303(2)
Federal Constitution art 7(2)
Penal Code ss 193, 467, 471

Appeal from: Criminal Appeal No 42(ORS)-36–05 of 2015 (High Court, Kuala Lumpur)

Manjeet Singh Dillon (Melissa Ram) for the appellant.
Fatnin bt Yusof (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Hasnah Hashim JCA:

[1] This appeal is against the decision of the learned High Court judge made on 6 April 2016, dismissing the appeal of the appellant against the decision of the sessions court judge dated 11 May 2015. We heard the appeal on 10 April 2017 and after perusing the record of appeal and considering both the written and oral submissions of learned counsel for the parties, we unanimously dismiss the appeal. These are our reasons.

THE ANTECEDENTS

[2] This case has had a chequered history. Therefore, it is necessary to narrate the background facts at some length to appreciate the legal issues arising in this instant appeal.

Kuala Lumpur Sessions Court No 62–130 of 2000

[3] On 23 October 2000 the appellant was initially charged with three charges under s 471 read together with s 467 of the Penal Code ('the PC') in the Kuala Lumpur Sessions Court No 62–130 of 2000 ('the first trial'). At the first trial, the sessions court judge called for the appellant to enter his defence. The appellant gave evidence under oath. On 26 June 2010, the deputy public prosecutor cross-examined the appellant and referred to a Penang High Court Civil Case (OS No 24–88 of 1995). After re-examination of the appellant, the appellant was released as a witness. The appellant called 23 witnesses and closed his case on 28 January 2011. On 22 February 2011, the deputy public prosecutor made an oral application to recall the appellant for further cross-examination and also to recall three other witnesses. The sessions court judge refused the application.

Kuala Lumpur Sessions Court No 62–164 of 2011

[4] Before the sessions court judge could deliver her decision in respect of the

first trial, the appellant was charged on 7 March 2011 at the Kuala Lumpur Sessions Court for committing perjury arising in the course of the said first trial. The charge preferred against the appellant in the Kuala Lumpur Sessions Court Case No 62–164 of 2011 ('second trial') reads as follows:

> Bahawa kamu pada 24 Jun 2010 di Mahkamah Sesyen (Jenayah 2), Jalan Duta, Kuala Lumpur dalam Wilayah Persekutuan Kuala Lumpur, semasa dipanggil sebagai saksi pembelaan yang pertama (SD1) di dalam prosiding Perbicaraan Jenayah Kes Tangkap 2–62–130-2000 *Pendakwa Raya v Kanawagi a/l Seperumaniam*, dihadapan Hakim Puan Rosenani bt Abdul Rahman telah memberi keterangan palsu semasa di peringkat pemeriksaan balas di mana kamu telah menyatakan perkataan-perkataan yang tertera di Lampiran 'A(1)' dan A(2)' (yang digariskan) yang dilampirkan bersama dan kenyataan tersebut yang mana kamu ketahui sebagai palsu dan dengan itu kamu telah melakukan kesalahan di bawah seksyen 193 Kanun Keseksaan yang boleh dihukum bawah seksyen yang sama.

[5] With regards to the first trial, the sessions court judge convicted and sentenced the appellant on all the three charges on 31 May 2011. Dissatisfied with the impugned decision, the appellant appealed to the High Court (Criminal Appeal No 42S-87 of 2011). On 23 March 2012, the High Court granted a stay of the Kuala Lumpur Sessions Court Case No 2–164 of 2011 proceedings pending the disposal of the appeal of the first trial. On 9 March 2015, the High Court judge allowed the appeal and set aside the conviction and acquitted the appellant of all the three charges.

[6] Dissatisfied with the aforesaid decision, the deputy public prosecutor appealed to the Court of Appeal. On 3 March 2017, the Court of Appeal allowed the appeal in part as follows:

> Dengan sebulat suara:
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> (i) Rayuan dibenarkan sebahagian;
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> (ii) Keputusan pelepasan dan pembebasan Responden oleh HMT diketepikan;
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> (iii) Sabitan terhadap Responden oleh HMS untuk ketiga-tiga pertuduhan iaitu: P1-Sek 471KK dibaca bersama Sek 467 Kanun yang sama, P2-Sek 199 KK yang boleh dihukum dibawah cabang pertama Sek 193 Kanun yang sama dan P3-Sek 471 KK dibaca bersama Sek 467 Kanun yang sama adalah disahkan;
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> (iv) Hukuman yang dijatuhkan oleh HMS terhadap Responden diketepikan;
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> (v) Responden dihukum untuk:- P1-1 hari penjara (3 March 2017) dan denda RM100,000.00 gagal bayar 6 bulan penjara, - P2-1 hari penjara (3 March 2017) dan denda RM 100,000.00 gagal bayar 6 bulan penjara dan bagi- P3-1 hari penjara (3 March 2017) dan denda RM100,000.00 gagal bayar 6 bulan penjara;

(vi) Hukuman penjara berjalan serentak; dan

(vii) Denda di bayar pada atau sebelum 10 March 2017.

Criminal Notice of Application No 64–34–04/2011

[7] The appellant subsequently filed an application on 14 April 2015 in the sessions court seeking the following orders:

(1) Bagi satu perintah pertuduhan terhadap Kanawagi a/l Seperumaniam dalam Mahkamah Sesyen Kuala Lumpur Kes No 62-164-2011, *Pendakwa Raya lwn Kanawagi a/l Seperumaniam* yang dituduh memberi keterangan palsu semasa pemeriksaan balas dalam Perbicaraan Jenayah Kes No 62-130-2000 dan telah menyatakan perkataan-perkataan yang tertera di Lampiran 'A(1)' dan 'A(2)' yang dilampirkan bersama kertas pertuduhan, diketepikan dan dibatalkan dan selanjutnya Tertuduh, Kanawagi a/l Seperumaniam dibebaskan dan dilepaskan (be set aside and quashed and consequently the Accused, Kanawagi a/l Seperumaniam being discharged and acquitted);

(2) Dalam alternatif
Bahawa Tertuduh, Kanawagi a/l Seperumaniam dibebaskan dan dilepaskan terhadap pertuduhan yang dibawa terhadapnya dalam Mahkamah Sesyen Kuala Lumpur Kes No 62-164-2011, *Pendakwa Raya lwn Kanawagi a/l Seperumaniam* (alternatively the Accused, Kanawagi a/l Seperumaniam being discharged of the charge preferred against him in Mahkamah Sesyen Kuala Lumpur Kes No 62-164-2011, *Pendakwa Raya lwn Kanawagi a/l Seperumaniam);*

(3) Selanjutnya dalam alternatif bagi satu perintah bahawa kesemua prosiding-prosiding dalam Mahkamah Sesyen Kuala Lumpur Kes No 62-164-2011, *Pendakwa Raya lwn Kanawagi a/l Seperumaniam* digantungkan sehingga rayuan Timbalan Pendakwa Raya kepada Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi yang diberikan dalam Mahkamah Tinggi Kuala Lumpur Rayuan Jenayah No 425-87-2011, *Kanawagi a/l Seperumaniam lwn Pendakwa Raya* didengar dan diselesaikan secara muktamad (further in the alternative for an order that all proceedings in Kuala Lumpur Sessions Court Case No 62-164-2011, *Pendakwa Raya vs Kanawagi a/l Seperumaniam,* be stayed until the DPP's appeal to the Court of Appeal against the decision of the High Court given in Kuala Lumpur High Court Criminal Appeal No 425-87-2011 be heard and finally disposed off);

(4) Apa-apa relif/dan atau perintah yang difikirkan wajar dan adil oleh Mahkamah Yang Mulia.

[8] The application was purportedly made pursuant to s 303(2) of the Criminal Procedure Code ('the CPC') read together with art 7(2) of the Federal Constitution and/or under the inherent jurisdiction of the court. The affidavit in support of the application affirmed by the appellant himself, sets out the

grounds for making the application, namely, that the charge is barred by the doctrine of autrefois acquit or convict including issue estoppel. We reproduce the relevant part of the appellant's affidavit as follows:

> ... (e) Kes pendakwaan dalam Kes Kedua terhadap pihak Pemohon tidak berdasarkan pada dua pernyataan tidak selaras yang diperbuat oleh pihak Pemohon tetapi atas pernyataan yang diperbuat oleh orang lain berbanding dengan pernyataan pihak Pemohon dalam Kes Pertama dan pihak pendakwaan tidak mencabar kebolehpercayaan pihak Pemohon dalam Kes Pertama dan oleh itu keterangan yang diberikan oleh Pihak Pemohon dalam Kes Pertama kekal sebagai tidak dicabar.
>
> (f) Tajuk perkara pertuduhan dalam Kes Kedua telah secara jelas (distinct) dibangkitkan dan didapati dalam prosiding-prosiding Kes Pertama dan setelah Mahkamah Tinggi membenarkan rayuan terhadap keputusan Kes Pertama, undang-undang isu estopel kini terpakai dan pihak Pendakwaan tidak boleh membangkitkan isu-isu tersebut.
>
> (g) Pihak Pendakwaan dalam meneruskan dengan Kes Kedua kini meminta Mahkamah dalam Kes kedua untuk menolak atau mengabaikan pendapat atau penemuan Mahkamah sebelum ini dan membuat pendapat atau penemuan fakta baru yang tidak konsisten dengan pendapat fakta Mahkamah sebelum ini dan yang mana undang-undang Negara ini tidak membenarkan.
>
> (h) Pihak Pendakwaan untuk membuktikan Kes Kedua perlu mengemukakan keterangan yang akan bertentangan dengan pembebasan (acquittal) pihak Pemohon dalam Rayuan Mahkamah Tinggi yang mana undang-undang autrefois convict, autrefois acquit, isu estopel dan res judicata tidak membenarkan ...

THE DECISION OF THE SESSIONS COURT

[9] The sessions court heard the application and on 11 May 2015 dismissed the same. The sessions court judge in his grounds of judgment explained that the hearing of the Kuala Lumpur Sessions Court Case No 62–164 of 2011 could not commence because of the stay granted on 23 March 2012 by the High Court. He further explained that the court was unable to determine whether the evidence adduced by the prosecution in Kuala Lumpur Sessions Court Case No 62–164 of 2011 is similar to the evidence adduced in Kuala Lumpur Sessions Court Case No 62–130 of 2000. Thus, the issue with regards to double jeopardy or abuse of court process can only be determined after the hearing of the full trial. The learned sessions court judge stated:

> Oleh yang demikian, pada peringkat ini mahkamah tidak boleh memastikan sama ada keterangan yang akan dikemukakan oleh Pendakwa Raya dalam Kes 62–164 Tahun 2011 adalah serupa dengan keterangan yang telah dikemukakan dalam Kes 62–130 Tahun 2000. Atas sebab itu, isu sama ada wujud double jeopardy atau penyalahgunaan proses mahkamah belum dapat diputuskan.

[10] The appellant then appealed to the High Court.

THE DECISION OF THE HIGH COURT

[11] On appeal, the High Court judge agreed with the sessions court judge that it is premature at that stage to determine whether the evidence to be adduced would be similar as the Kuala Lumpur Sessions Court Case No 62–130 of 2000. His reasons are set out in his grounds of judgment and we reproduce the relevant part as hereunder:

> [15] Mahkamah ini mendapati daripada affidavit-affidavit yang difailkan oleh kedua-kedua pihak, bahawa pertuduhan 'perjury' dalam *kes kedua* tersebut bukanlah berdasarkan fakta yang sama dalam pertuduhan *kes pertama*. Walaupun jawapan kepada soal balas Perayu yang menjadi asas pertuduhan *kes kedua* itu berkisar kepada perkara-perkara dalam kes sivil di Mahkamah Tinggi Pulau Pinang yang sama namun kesan-kesan jawapan itu yang menjadi persoalannya. Oleh itu ia bukan satu perbicaraan secara 'substantial' serupa dengan keterangan-keterangan dalam perbicaraan *kes pertama.* Dengan ini tidak menghalang pihak pendakwaan meneruskan pertuduhan dalam kes kedua tersebut.

[12] Having heard and considered the arguments of both parties, the High Court dismissed the appeal. Hence, this appeal before us.

PARTIES' COMPETING SUBMISSIONS

The appellant

[13] With respect, we would like to note at the outset that it is not easy to comprehend the question of law put forth by learned counsel for the appellant.

[14] If our understanding is correct, learned counsel for the appellant seems to suggest that the prosecution cannot charge a person whose credit has not been impeached for perjury. He argued that the prosecution can only charge a person whose credit has been impeached by the court resulting from his or her evidence in court.

[15] Further, it was argued that s 113(2) of the CPC prohibits any statement made by an accused during the police investigation to be admitted in court. Therefore, the statement recorded under s 113 of the CPC cannot be used to impeach the credibility of the appellant.

[16] The very substratum of the charge in the second trial is 'telah memberi keterangan palsu di peringkat pemeriksaan balas ... yang kamu ketahui sebagai palsu'. According to learned counsel, the charge in the second trial is unsustainable and doomed to failure because the appellant cannot be impeached in relation to answers given by him in cross-examination which has not been impeached by the court.

[17] The answer given by the appellant in cross-examination is in respect of Kuala Lumpur Sessions Court Case No 62–130 of 2000 where a final decision has been handed down by the court and no impeachment proceedings has been taken against the appellant.

[18] In a nutshell, learned counsel submitted that the prosecution cannot charge the appellant for perjury as it constitutes a fresh action against the person whose credibility has not been impeached and s 113(2) of the CPC gives a blanket immunity to an accused from being impeached based on his statement given in the course of police investigation.

THE PROSECUTION

[19] In response, learned deputy public prosecutor argued that the charges in both trials are not similar in nature. The charges against the appellant in the first trial was for the usage of a document knowing that it was false and with intent that it should in any way be used or acted on as genuine as well as filing a false affidavit. Whilst in the Kuala Lumpur Sessions Court Case No 62–164 of 2011 ('the second trial'), the charge against the appellant was for giving false evidence and thus committing perjury. Indeed, they are two different distinct offences under the Penal Code.

OUR DECISION

[20] Before us, the sole issue posed for our determination is simply this: whether a charge can be brought against the appellant arising from his testimony during cross-examination by the prosecution at the defence stage in the first trial. After hearing oral submissions of both parties, we had directed both counsels to file further written submission with authorities (if any) on whether the charge under s 193 of the PC was properly brought against the appellant. Now, s 193 of the PC provides as follows:

> Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine; and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

[21] On a plain reading of s 193 of the PC, it is clear that the section applies to a witness who gives false evidence in court and also to a witness who gives false written statement to be used in any criminal proceedings. In order to sustain a conviction under s 193 of the PC, the prosecution has to prove beyond reasonable doubt the following ingredients:

> that the accused was legally bound to state the truth, either by an oath or by an

express provision of law, or that the accused made the declaration in question. Due administration of the oath of the accused person should be proved like any other fact.

(i) that he made such statement whilst so bound.

(ii) that such statement, or declaration, was made in a stage of a judicial proceeding.

(iii) that such statement or declaration is false. It must be shown that the false statement charged against the accused is literally false. There must be a statement of fact which is false. It is no offence if the fact stated is true but some circumstance is suppressed, with the result that a wrong inference may be deduced.

(iv) that the accused when making such statement or declaration, (a) knew it to be false, or (b) believed it to be false, or (c) did not believe it to be true.

(v) that he made such false statement intentionally.

(See *Ratanlal & Dhirajlal's Law of Crimes: A Commentary on Indian Penal Code*: (Vol 1, 27th Ed); at p 961).

[22] For the offence of perjury, the prosecution must prove that the accused had deliberately made two statements which are so contradictory to and irreconcilable with each other that both cannot possibly be true. It is incumbent on the prosecution to show that the statement made by the accused was false. Learned authors, Ratanlal and Dhirajlal, on the subject of the nature of proof in the case of giving false evidence, stated as follows:

> The true rule in a case of giving false evidence is that no man can be convicted of giving false evidence, except on proof of facts which, if accepted as true, should not merely that it is incredible, but that it is impossible that the statements of the party accused made on oath can be true. If the inference from the facts proved falls short of this, it seems to us that there is nothing on which a conviction can stand, because assuming all that is proved to be true, it is still possible that no crime was committed.

(See *Ratanlal & Dhirajlal's Law of Crimes*: at p 962).

[23] It is clear, therefore, the court can only make such finding on any witness upon clear proof and on being satisfied that the witness had deliberately lied or otherwise. The trial judge must be fully satisfied that based on the evidence adduced, the two statements are not only contradictory but are from every point of view irreconcilable. If the accused proves that he did not intentionally make any false statement, he is entitled to be acquitted.

[24] In his submission, learned counsel had attempted to persuade us that

due to legal impediment as alluded to earlier, the prosecution would not be able to prove its case under s 193 of the PC against the appellant.

[25] With respect, we disagree. We are in full agreement with the learned High Court judge that it would be premature to conclude, at this stage, whether the prosecution would be able to prove its case under s 193 of the PC against the appellant. We are of the opinion that in the circumstances of this case, the most convenient procedure should be followed, namely that the prosecution should be allowed to present or offer evidence that would substantiate the charge against the appellant.

[26] In the second trial, the prosecution is yet to formally adduce the evidence in court. It is the duty of the public prosecutor to bring or pursue the prosecution of a criminal proceeding and to represent the public interest. The prosecution is also entitled to the due process in criminal cases, that is, a fair opportunity to prosecute. The court has always accorded this right to the prosecution.

[27] The appellant cannot claim denial of due process because he will have the opportunity to contest the evidence adduced against him and to prove his defence after the prosecution concludes its case.

CONCLUSION

[28] In the light of the foregoing, the learned High Court judge was correct in dismissing the application, so that the case should continue before the sessions court judge for the determination of whether the appellant had indeed fabricated evidence as alleged in the charge. The appeal is dismissed. The decision of the High Court is affirmed.

[29] We further order that the sessions court fix an early date to proceed with the full trial as soon as practicable.

Appeal dismissed; decision of High Court affirmed.

Reported by Fatin Ismail